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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STARRETT CITY ASSOCIATES, STARRETT CITY, INC., and DELMAR MANAGEMENT COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 14, 1988

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QUESTIONS PRESENTED

Starrett City is the nation's largest publicly-assisted housing community. Although it borders a black ghetto in Brooklyn, New York, its population is integrated: of some 17,000 residents, 63% are white, 22% are black, 8% are Hispanic and 5% are Oriental. This is no accident: it is the product of integration-oriented tenant selection.

The consequences are those which we all hope will flow from integration: the community lives in peace, the children's test scores are high, the crime rates are low.

The price is that, since blacks preponderate among applicants for Starrett City apartments, black families must wait longer than whites to rent homes.[1] But if Starrett City apartments were rented in order of application, the community would swiftly become segregated, and the benefits that have flowed from integration would be lost.

The courts below have ordered summary judgment compelling Starrett City immediately and totally to abandon its integration-oriented rental policies.

The issue here is of statutory construction only: the government makes no constitutional claim. The statute is the Fair Housing Act of 1968 ("the Act"). Section 3604 provides, in part, that it shall be unlawful

> (a) To refuse to . . . rent . . . a dwelling to any person because of race, color, . . . or national origin.

But Section 3608(a) charges the Secretary of Housing and Urban Development to

> . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.

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1 Except for the elderly, where white applicants preponderate to the point that they must wait longer than blacks (Appendices [hereinafter "A."] K-19).

Senator Mondale, co-sponsor of the Act, said that its purpose was to "replace ghettos with truly integrated and balanced living patterns," 114 Cong. Rec. 3422 (1968). And this Court said in *Linmark Associates* v. *Willingboro*, 431 U.S. 85, 94 (1977), that, by this Act, "Congress has made a strong national commitment to promote integrated housing."

In light of these statutory provisions, these questions are presented:

1. Does the Act compel abandonment forthwith of Starrett City's integration-maintenance rental policies, despite the unquestioned good faith of the project owner and the approval of those practices by the Department of Housing and Urban Development ("HUD") and by city and state authorities, or are the policies of the Act better served by allowing Starrett City appropriate time to phase out integration-maintenance so that this integrated community may be preserved?

2. Is the summary judgment ordered below proper, or is Starrett City entitled to a trial at which it can prove its good faith, the widespread approval of its practices, and the consequences that will follow if those policies must abruptly be scrapped?

Or, most simply:

3. Shall the Act be applied in such a manner as to destroy the very model of the integrated community it was enacted to bring into being?

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STARRETT CITY ASSOCIATES, STARRETT CITY, INC., and DELMAR MANAGEMENT COMPANY,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Starrett City Associates, Starrett City, Inc., and Delmar Management Company[2] (collectively "Starrett City") ask that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered on March 1, 1988.

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2 Petitioners list the following parent companies, subsidiaries and affiliates pursuant to Rule 28.1: Starrett City Associates is a New York limited partnership that owns Starrett City. The general partners of Starrett City Associates are: (a) Petitioner Starrett City, Inc., a Limited Dividend Housing Corporation organized under Article II of the Private Housing Finance Law of New York; and (b) Disque Deane. Petitioner Delmar Management Company ("Delmar Management") is the managing agent for Starrett City. Delmar Management is owned 50% by Grenadier Realty Corporation and 50% by HRH Construction Corporation, both of which are wholly-owned subsidiaries of Starrett Housing Corporation.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 840 F.2d 1096, appears beginning at page A-1 of the Appendices to this petition. The opinion of the United States District Court for the Eastern District of New York (Neaher, J.), reported at 660 F. Supp. 668, appears beginning at page F-1 of the Appendices.

JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1988. A timely petition for rehearing with a suggestion of rehearing *en banc* was denied on April 7. A timely motion for a 30-day stay of the mandate of the Court of Appeals, pending application to this Court for a writ of certiorari, was granted on April 15, and the stay was extended for an additional 60 days on May 5, and then for a further 10 days on July 8. Petitioners' application to Justice Marshall of this Court for an extension of time until July 15 in which to petition for certiorari was granted on June 29. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 28 U.S.C. § 1345 and 42 U.S.C. § 3613.

STATUTE INVOLVED

Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631. Because of its length, we print the text in the Appendices beginning at page J-1.

STATEMENT OF THE CASE

Petitioners are the developers and managers of Starrett City, a rental housing development consisting of 46 high-rise apartment buildings on 153 acres in Brooklyn, New York (A. K-1). Financed by HUD and the State of New York, and given tax abatements by the City of New York, Starrett City was completed in 1974 (A. K-7-12, 17). It contains 5,881 apartments, housing more than 17,000 residents of 39 different nationali

ties (A. K-23). The tenants are people of middle income, with income ceilings fixed by federal regulation (A. K-10, 11). Starrett is a self-contained community, with two on-site public schools, an early-learning center, a recreation and community center, a medical center, a power station, a shopping center and eight parking garages (A. K-2, 30).

Starrett City is built on a garbage dump, adjacent to a black neighborhood plagued by crime and vandalism and studded with abandoned, boarded-up buildings (A. K-14). The project sits in the flight path of Kennedy Airport. It borders a junk yard, a heavily traveled highway and a pollution control plant. It is separated from nearby all-white neighborhoods by a stagnant creek (A. K-14).

Yet Starrett City is not only the largest publicly-assisted housing project in the United States, it is also a rarity in that it is successfully integrated: it is literally true that every floor of every building houses blacks, whites, Hispanics, Asians, young and old (A. K-19-20, 23).

Starrett City is a safe community; its crime rates are markedly lower than those of the surrounding area (A. K-89-91). Indeed, a 1985 study (not part of this record), sponsored by Starrett City and conducted by the Pennsylvania State University, showed Starrett to be one of the safest places to live in the United States. It is free of vandalism and graffiti (A. K-94-98). Most important, its integrated schools are among the top-performing schools in New York City—confirming the view that stable school integration affords lasting benefits and enhanced educational opportunities to all students (A. K-92-94).

In short, Starrett City is a success. And its success is the product of the integration-oriented rental policies which are here under attack.

There is no dispute on this record that, from the time Starrett City was first constructed, renting apartments on a first-come, first-served basis would have resulted in a segregated community (A. K-3, 4, 14, 18, 26, 54-52, 82). Nearly all initial applicants for apartments were black (A. K-14, 17). The project's

location and the lack of public transportation, coupled with the general trend of white movement to the suburbs, made Starrett City unattractive to many whites (A. K-14). Neither the addition of such suburban-style amenities as parks, pools and a security force, nor an affirmative marketing effort costing millions of dollars, drew large numbers of white applicants (A. K-16-18).

So petitioners have never rented apartments on a first-come, first-served basis. Initially in order to achieve integration, and then in order to maintain integration, petitioners have carefully apportioned apartments among whites, blacks, Hispanics, the elderly and other groups (A. K-18-20). While no one has ever been denied an apartment at Starrett City because of race or ethnic origin, minorities, on average, spend a longer time on the waiting list (A. K-2, 3).

That Starrett City would swiftly become segregated in the absence of integration maintenance cannot be—and is not in this record—denied. Minority applications for apartments consistently outnumber white applications by margins of up to 4-1 (A. K-24-26). Moreover, whites are over-represented among tenants moving out (A. K-26). Starrett City's expert filed an affidavit saying:

> . . . I think it is beyond question that, in the absence of effective occupancy controls, Starrett City would become an overwhelming minority development within a very short period of time . . . at least 80% minority within three to five years.

(A. K-8). The government's expert said that he could not be sure, but his arithmetic calculation was that it

> . . . would take approximately 5 years or more for the development to approximate the racial composition of its tenant waiting list [approximately 80% minority].

(A. K-104). To prevent this outcome, Starrett City has done what it has done; and it has thereby accomplished what it has accomplished.

At all times, the federal, state and city governments knew of and approved Starrett City's practices (A. K-3, 9, 12, 13, 15, 18, 31-33, 34-35, 49-50). Robert C. Rosenberg, who has managed Starrett City since 1973, says in his affidavit:

> From the outset, there was no question that both the federal and state governments wanted Starrett City to become and remain an integrated project. Officials of the New York State Division of Housing and Community Renewal ("DHCR") and the United States Department of Housing and Urban Development ("HUD") discussed the subject of integration with Starrett City's representatives and left no doubt that they wanted Starrett City to do what was necessary to rent the development on an integrated basis. Representatives of DHCR and HUD visited the development on numerous occasions during the rent-up period, and they were fully informed of the measures being employed by Starrett City to achieve an integrated tenant population. Starrett never would have undertaken its tenant selection practices had it not been for the active support and encouragement of the state and federal governments.

(A. K-3). The government does not disagree.

Starrett City's policies have not gone without challenge in the courts. In 1979, a class of black plaintiffs on the waiting list at Starrett City, represented by the N.A.A.C.P., filed an action asserting that the rental policies were barred by the Fair Housing Act and the Constitution, *Arthur, et al.* v. *Starrett City Associates, et al.*, 79 Civ. 3096 (E.D.N.Y. filed Dec. 5, 1979) (A. K-20). The petitioners here were made defendants, as was the DHCR.

In May 1984, after five years of litigation and negotiation, the parties hammered out a settlement (reprinted in full as Appendix I) that was designed to address, not only the issues raised by the complaint, but also the broader problems of the shortage of housing for minorities throughout New York City and the fact that many other publicly-assisted projects in New York City were all-white or nearly so (A. I-7). Starrett agreed to in-

crease the apartments occupied by black and Hispanic families from 28.8% to 31.8% over a five-year period, (A. I-7) while the DHCR agreed to increase minority occupancy at other New York City developments to the end that all DHCR developments would have at least 20% minority occupancy within 15 years (A. I-9). The DHCR agreed also to give preference at these largely-white projects to minority applicants from Starrett City's waiting list (A. I-15). All parties acknowledged that their ultimate goal was an integrated Starrett City which would not need integration-maintenance practices (A. I-7).

Although it had refused to join in the *Arthur* litigation, the United States promptly sued petitioners (but not the DHCR), alleging that Starrett's rental practices violated the Fair Housing Act (but not the Constitution). The government moved for summary judgment and petitioners cross-moved.

Somewhat remarkably, the district judge who had approved the *Arthur* settlement granted the government's motion for summary judgment, ruling that Starrett's integration-maintenance program violated the Fair Housing Act despite the program's integrationist purpose (A. F-20).

On appeal, a divided Second Circuit panel affirmed. Treating the Fair Housing Act as congruent with another anti-discrimination statute, Title VII, the majority (Miner, Altimari, JJ.) held Starrett City's practices unlawful because (1) "no definite termination date for Starrett's quotas is perceivable," and (2) there was no showing of prior racial discrimination adversely affecting whites, which, in the court's view, was necessary to justify any plan favoring white applicants—even a voluntary program adopted by a private party to foster integration (A. A-13). Finally, the majority held that, because Starrett City's plan operated as a "ceiling quota," it acted to the detriment of the very people for whom Title VIII was intended to open housing opportunities (A. A-13). The majority concluded:

> We do not intend to imply that race is always an inappropriate consideration under Title VIII in efforts to promote integrated housing. We hold only that Title VIII does not allow appellants to use rigid racial quotas of indefinite du-

> ration to maintain a fixed level of integration at Starrett City by restricting minority access to scarce and desirable rental accommodations otherwise available to them.

(A. A-16). Thus the majority apparently recognized that the policy objectives of Title VIII permit consideration of race in tenant selection—the majority just did not approve the way Starrett City does it. But instead of remanding for the structuring of relief which would recognize Starrett City's lawful objectives, the majority affirmed the judgment below that would swiftly segregate the community.

Judge Newman dissented. Noting the government's "close cooperation in the development of Starrett City as an integrated housing complex," Judge Newman said that the bringing and the timing of this action raised "a substantial question as to the Government's commitment to integrated housing" (A. A-20). The Fair Housing Act was never intended to strike down pro-integration measures, said Judge Newman:

> Title VIII bars discriminatory practices in order to end segregated housing. Starrett City is not promoting segregated housing. On the contrary, it is maintaining integrated housing. It is surely not within the spirit of the Fair Housing Act to enlist the act to bar integrated housing. . . . A law enacted to enhance the opportunities for people of all races to live next to each other should not be interpreted to prevent a landlord from maintaining one of the most successful integrated housing projects in America.

(A. A-22-23). At a minimum, Judge Newman believed Starrett was entitled to a trial on the need for its integration-maintenance policy (A. A-27).

Their petition for rehearing having been denied, petitioners apply to this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW DEALS WITH IMPORTANT QUESTIONS THAT HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

Few social problems have proved as intractable as achieving meaningful integration in American housing, and few carry as much portent for our nation's future. The Fair Housing Act was the nation's response to the 1968 report of the Kerner Commission, with its famed warning that

> Our nation is moving toward two societies, one black, one white—separate and unequal.

Today, in housing at least, that dire prediction is realized truth.

Starrett City is a rare, successful effort to reverse this terrible fact. This Court has never squarely considered whether such efforts are barred or encouraged by the Fair Housing Act. So critical a question of law, with such a manifest and dramatic impact on our nation, should not be finally determined without review in this Court.

The Questions Presented by This Case

Read literally and out of the context of its history and purpose, Sections 3604(a)-(d) of the Fair Housing Act, which Starrett City is accused of violating, would seem to prohibit race-conscious rental practices, regardless of their beneficient purpose.

But this Court has so often ruled that it is wrong to read the letter of a law without attending to its spirit. *See, e.g., Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892). And, most specifically, in *Steelworkers* v. *Weber*, 443 U.S. 193 (1979), this Court declined to adopt a literal reading of Title VII of the Civil Rights Act, which bars discrimination in employ-

ment, so as to forbid private employers from voluntarily adopting affirmative action plans that accord racial preferences to blacks. Viewed in light of the Congress's primary concern in enacting Title VII, which was to improve "the plight of the Negro in our economy," the Court held that "reliance upon a literal construction of [Title VII] is misplaced" because the race-conscious practices under challenge were "voluntarily adopted by private parties to eliminate traditional patterns of racial segregation" (443 U.S. at 201) (Title VII of the Civil Rights Act of 1968, § 2000e-2, is reprinted in the Appendices beginning at page J-8).

So here, the question on which petitioners seek review is whether Title VIII of the Civil Rights Act forbids Starrett City from voluntarily employing race-conscious measures to achieve and maintain integration in a housing project that would surely be segregated but for affirmative efforts to preserve its multiracial character. That question, we submit, is no less worthy of review under Title VIII than it was under Title VII.

The face of the Fair Housing Act as a whole makes it clear that Congress intended to do more than simply prohibit discrimination in housing, which is all the literal language of Section 3604 addresses. Rather, as we have seen, the Act directs the Secretary of Housing and Urban Development to administer the statute *affirmatively* in order to effect its underlying policies, 42 U.S.C. § 3608(d). That section has been broadly interpreted to uphold policies that achieve, and condemn policies that defeat, "the goal of open, integrated residential housing patterns and . . . prevent the increase of segregation. . . ." *Otero* v. *New York City Housing Authority*, 484 F. 2d 1122, 1134 (2d Cir. 1973). As the First Circuit observed last year, "every court that has considered the question has held or stated that Title VIII imposes upon HUD an obligation to do more than simply refrain from discriminating." *NAACP* v. *Secretary of HUD*, 817 F.2d 149, 155 (1st Cir. 1987).[3]

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3 *See. e.g.*, *Huntington Branch, NAACP* v. *Huntington*, 844 F.2d 926, 935 (2d Cir. 1988); *United States* v. *Yonkers Board of Education*, 837 F.2d 1181, 1218-19 (2d Cir. 1988), *cert. denied*, _____ U.S. _____ (1988); *Anderson* v. *City of Alpharetta*, 737 F.2d 1530, 1537 (11th

As the dissent below recognized, the decision to enjoin Starrett City's integration-maintenance program, when it is certain that the project will become segregated once the program is abandoned, does violence to the spirit of the Fair Housing Act—violence that this Court alone can correct.

A subsidiary issue raised by the ruling below is whether the law of affirmative action developed under Title VII to deal with employment discrimination is so pertinent to the goals of the Fair Housing Act that the latter statute should be interpreted in complete congruence with Title VII. The majority below read into the Fair Housing Act a limit on the duration of any race-conscious measures adopted to promote integration. The majority derived this limitation from Title VII, which has been construed to permit only those voluntary race-conscious programs that are of limited duration (A. A-11-12).

But as Judge Newman observed in his dissent:

> Though Titles VIII and VII share a common objective of combating discrimination, their differing contexts preclude the assumption that the law of affirmative action developed for employment is readily applicable to housing.

(A. A-26n4). In particular, Title VIII has a much broader purpose than Title VII. As this Court has long recognized, the sponsors of Title VII explicitly disavowed the goal of creating any permanent racial balance in an employer's work force. *Local 28 Sheet Metal Workers Int'l. Assoc.* v. *EEOC*, 478 U.S. 421, 106 S. Ct. 3019, 3039-43 (1986); *Steelworkers* v. *Weber*, 443 U.S. 193, 207 (1978). Therefore, courts have always refused to read into Title VII any obligation to maintain integration in the work force once it is achieved. *Ibid.* But the sponsors of the Fair Housing Act were determined that *this* statute be applied

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Cir. 1984); *Alschuler* v. *Department of HUD*, 686 F.2d 472, 482 (7th Cir. 1982); *Garrett* v. *City of Hamtramck*, 503 F.2d 1236, 1247 (6th Cir. 1974); *Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973); *Shannon* v. *Department of HUD*, 436 F.2d 809, 821 (3d Cir. 1970). *See also Barrick Realty Inc.* v. *City of Gary*, 491 F.2d 161, 165 (7th Cir. 1979) (integration policy of municipality).

to achieve *lasting* integration. As the Second Circuit said in *Otero* v. *New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973), Title VIII requires those who administer housing programs to do more than an employer is required to do under Title VII, *i.e.*, refrain from discriminating; rather, those who implement Title VIII must

> . . . take action to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.

This Court has never considered whether Title VIII ought to be analogized to Title VII. Specifically, it has never decided whether the limitations on affirmative efforts to integrate the work place under Title VII—limitations derived from the limited purpose of that law—ought to be similarly applied to efforts to integrate housing. That question is particularly worthy of review by this Court because integration of housing is critically different from integration in the workplace. Whites do not quit their jobs in large numbers in response to the hiring of minorities: Not one of the many Title VII cases considered by this Court has seen any such development. In contrast, it is a matter of sad fact that many whites *do* leave their neighborhoods when minorities arrive, replacing one kind of segregation with another. This difference alone would seem to undermine the wisdom of a rigid application of the law of affirmative action in employment to questions of affirmative action in housing.

Impact on Other Cases

Review of this case is required, we submit, not only in the interest of the more than 17,000 people who live in harmony in Starrett City, but also because of the impact the decision here will have on other cases.

Starrett City is by no means the only publicly-assisted housing project whose integration-maintenance program has been

challenged by the government. Since this action was filed in 1984, the Justice Department and HUD have demanded that dozens of publicly-assisted housing projects abandon integration-maintenance programs that were adopted with the knowledge and approval—and sometimes at the behest—of HUD.[4] Suits similar to this one have been brought against two other successfully-integrated projects: in Chicago, *United States* v. *Atrium Village Associates, et al.*, No. 87-C-6527 (N.D. Ill. filed Sept. 24, 1987), and in Charlottesville, *United States* v. *Charlottesville Redevelopment and Housing Authority*, No. 86-0033-C (D. Va. filed July 8, 1986).

The government has taken the position that the Second Circuit's opinion in this case compels judgment in its favor in these cases. Presumably, the government will sue all communities which do not voluntarily abandon integration maintenance.

Thus, unless reviewed and reversed by this Court, the Second Circuit's ruling is likely to result in a nationwide wave of segregation where integration has been carefully and honorably accomplished. True, other courts of appeals may differ with the Second Circuit. But then the issue will surely require resolution by this Court, and meanwhile Starrett City and other communities will have become ghettos.

The most pitiable victims, we must point out, will be the more than 2,500 school children of Starrett City. The community's fully-integrated public schools are practically unique in New York City, and the high performance level of their students attests to the success of integrated education—Starrett City children leave their schools educated (A. K-92). If Starrett is forced to become a segregated, all-minority community, its schools will follow suit, to the detriment of black and white children alike.

And, of course, if the decision below sets the pattern for the nation, and integrated communities everywhere become ghettos, the impact will be felt by children everywhere. Segre-

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4 This statement is based on discovery materials produced in *United States* v. *Charlottesville Redevelopment and Housing Authority*, No. 86-0033-C (D. Va. filed July 8, 1986).

gated housing creates segregated schools—which create crippled children.

II.

SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS WAS ERROR

In *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 247 (1986), this Court held that summary judgment could be granted where—and only where—there are no "disputes over facts that might affect the outcome of the suit under governing law." Where, as here, no discriminatory animus motivates voluntary race-conscious measures, petitioners are entitled to a factual determination on their claim that those measures are necessary. *See Parent Ass'n. of Andrew Jackson High School* v. *Ambach*, 598 F.2d 705, 718, 720 (2d Cir. 1979), and *Otero* v. *New York City Housing Authority*, 484 F.2d 1122, 1137 (2d Cir. 1973) (cases remanded for trial to determine whether plans were necessary to achieve integration and prevent an increase in segregation).

This principle ought to have precluded the entry of summary judgment against petitioners. Starrett City submitted extensive evidence that it would become segregated within five years if its race-conscious rental practices were enjoined at this time. That evidence—uncontradicted by anything in the government's meager presentation (printed in its entirety at A. K-101-104)—was so overwhelming that the dissenting panelist below believed it might have compelled summary judgment *in favor of petitioners* (A. A-27). At a minimum, it surely precluded the entry of judgment without a trial.

But the lower courts denied petitioners their trial. That denial was flatly inconsistent with Fed. R. Civ. P. 56, since it necessarily meant that issues of fact concerning the need for integration maintenance—and the need for time in phasing out integration maintenance in order not to destroy the community—were resolved on summary judgment. Such egregious error should surely not be allowed to stand in a case that raises important and sensitive issues of law and social policy.

CONCLUSION

In oral argument in the Court of Appeals, Assistant Attorney General William Bradford Reynolds stated the government's position starkly:

> We have neighborhoods across this land that are one race or predominantly one race and there is nothing that suggests that there is anything offensive with regard to that condition.

We submit that the Congress, in the Fair Housing Act of 1968, found "that condition" terribly "offensive."

We ask this Court, in consequence, to review and reverse the decision below.

Dated: July 14, 1988

Respectfully submitted,

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